STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 27, 2007
v	No. 268602 Monroe Circuit Court
RANDY LEE RAY, Defendant-Appellant.	LC No. 05-034767-FC

Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and was sentenced as an habitual offender, fourth offense, MCL 769.12, to 25 to 50 years in prison. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that he is entitled to a new trial due to ineffective assistance of counsel. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

> To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003) (citations omitted).]

Defendant's primary complaint is that trial counsel structured his defense "based on the old armed robbery statute."

It is counsel's duty to make an independent examination of the facts, laws, pleadings, and circumstances involved in the matter, and to pursue all leads relevant to the issues. *People v Grant*, 470 Mich 477, 486-487 (Kelly, J.), 498 (Taylor, J.); 684 NW2d 686 (2004). A sound trial strategy is one based on investigation and supported by reasonable professional judgments. *Id.* "A defendant is entitled to have his counsel investigate, prepare and assert all substantial defenses." *People v Hubbard*, 156 Mich App 712, 714; 402 NW2d 79 (1986). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant did not dispute robbing the bank, or presenting a note to the teller in which he implied that he had a gun. He argued, however, that there was no evidence that he was actually armed with any type of weapon. But under the armed robbery statute, MCL 750.529, as amended in July 2004, it was sufficient that the defendant "represents orally or otherwise that he . . . is in possession of a dangerous weapon." Defense counsel argued that the prosecution failed to prove that defendant was armed because there was no evidence that defendant possessed an actual weapon and no objective evidence that he possessed a feigned weapon. See *People v James Banks*, 454 Mich 469, 480-481; 563 NW2d 200 (1997); *People v Jolly*, 442 Mich 458, 469; 502 NW2d 177 (1993); *People v Parker*, 417 Mich 556, 565; 339 NW2d 455 (1983). We agree that it was not a reasonable trial strategy to defend a 2005 armed robbery charge on the ground that the prosecutor could not prove the elements of the offense as they existed before July 1, 2004. However, the mere fact that counsel's performance was deficient does not entitle defendant to relief unless he was prejudiced by counsel's error. *Watkins, supra*.

Considering that defendant confessed to robbing the bank, that he implied in his note that he was armed with a gun, and that the teller testified that defendant pointed "something round and silver" at her, there is no reasonable likelihood that the outcome of the trial would have been different but for counsel's deficient performance. Defendant tacitly concedes as much, arguing only that he was deprived of a possible plea bargain. In a November 18, 2005, letter to the trial judge, however, defendant stated, "Now here is what I think should happen to me. Lower my charge to unarmed robbery or larceny of a person. [D]on't give me the 12 to 26 years the prosecutor, John T. Marunick offer me. Yes, I should be punish. [B]ut give me 3, 4, or 5 year (min) . . . ." Thus, while there is some evidence of an offer that included a sentence agreement, it is clear from the record that defendant would not have accepted that offer. Defense counsel instead sought to continue negotiations and, at the December 9, 2005, pretrial, he requested "a two-week continuance for a final pretrial . . . to give me a chance to try to work something out" with the prosecutor. There is nothing else in the record to show that a more advantageous offer was made that defendant would have accepted and thus defendant has not shown that he was prejudiced. See *People v Williams*, 171 Mich App 234, 241; 429 NW2d 649 (1988).

We have reviewed the additional claims of ineffective assistance of counsel raised in defendant's supplemental brief and find nothing in the record to establish prejudicial error. Further, because defendant has not made an offer of proof establishing the existence of a factual dispute which might, if further developed, possibly be resolved in his favor, we decline to remand for an evidentiary hearing. See *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995); *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985).

Affirmed.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens